APR 25 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 923

HENRY V. McGURREN,
Petitioner-Defendant,

vs.

GLADYS McVEIGH, ETC.,
Respondent-Plaintiff.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

THOMAS DODD HEALY,
BERNHARDT FRANK,
208 S. La Salle St.,
Chicago, Ill.,
Attorneys for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 330 WEST JACKSON, CHICAGO

SUBJECT INDEX.

PAGE

Statement of the Case 1-3

Questions Presented and Summary of Argument 4-5

Argument 6-26

I. The Decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals or with decisions of Courts of the State of Illinois with respect to the overruling of Defendant's plea of Res Adjudicata 6-17

II. The Decision of the Court of Appeals with respect to the question of the validity or invalidity of the release is in conformity with applicable local Illinois decisions and was not in conflict with any decision of any other Circuit Court of Appeals 18-24

III. The decision of the Court of Appeals with respect to the exclusion of the Probate Objection was not in conflict with applicable local decisions 24-25

IV. The opinion of the Court of Appeals was not in conflict with any applicable local decision with respect to the instruction on the burden of proof 25-26

Conclusion 26

TABLE OF CASES AND TEXTBOOKS CITED.

American Exp. Co. v. Des Moines Bank, 146 Iowa 448. 15
Andrews v. Votaw, 240 Ill. App. 311 23
Bigelow v. Old Dominion Co., 203 Mass. 159 .....1, 15, 17
Bigelow v. Old Dominion Copper Co., 225 U. S. 111 .7, 10, 15
Carey v. Conn, 107 Ohio St. 113 15
Chanin v. Chevrolet, 89 F. (2) 889 (C. C. A. 7) 19
Cragin v. International S. S. Co., 15 F. (2) 263 (C. C. A. 2) 15
Crane v. Shaefer, 140 Ill. App. 647 26
Crescent City Co. v. Butcher's Union, 120 U. S. 141 ... 8
Endsley v. Johns, 120 Ill. 449 26
Feitl v. Chicago Ry. Co., 211 Ill. 279 14
Fitch v. Stanton, 190 Fed. 310 (C. C. A.) 8
Inhabitants of Sturbridge v. Franklin, 160 Mass. 149 .. 9
Ivanhoe v. Buda Co., 247 Ill. App. 336 .....22, 24
Keokuk R. R. v. Mo., 152 U. S. 301 8
Leonard v. Springer, 197 Ill. 532 30
Lindley v. Kamp, 76 N. E. 798 (Ind. App.) 22
Litchfield v. Crowe, 123 U. S. 149 7
McFadden v. Land Co., 253 S. W. 917, 928 .....15, 16
Merchants Bank v. Lyon, 185 Ill. 343 26
Miller v. Steel, 153 Fed. 714 26
Mobile R. R. Co. v. Jurey, 111 U. S. 584 20
Moore v. Williams, 132 Ill. 589 20
Mortimer v. McMullen, 202 Ill. 413 26
Mutual Life v. Armstrong, 117 U. S. 591 20
Myers Adm. v. Brown, (Ky. App.) 61 S. W. (2) 1052 .. 15
Penn. R. R. v. Minds, 250 U. S. 368, 375 20

Portland Gold Mining Co. v. Strattons, Ltd., 158 Fed. 63 ..... 6, 7, 10, 13
Reeve v. Dennett, 145 Mass. 23, 28..... 22
Rosenfield v. Rosenfield, 2 N. Y. Supp. (2d) 107..... 22
Solonemsky v. Zevin, 267 N. Y. Supp. 589 (App. Div.). 22
Sutter v. Kansas City, 138 Mo. App. 105, 119 S. W. 1084 (Kan.) 15
Tate v. Watts, 42 Ill. App. 103..... 20
Thornton v. Columbus Gas Co., 18 Ohio St. Pns. 158, 160 15
United States v. Socony Oil, 310 U. S. 150, 310..... 22
34 C. J. 1024..... 10
24 Am. & Eng. Enc. Law, 2d Ed., page 747..... 10
Freeman on Judgments (5th Ed.) par. 469, Vol. I, page 1029 10

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 923

HENRY V. McGURREN,
Petitioner-Defendant,

vs.

GLADYS McVEIGH, ETC.,
Respondent-Plaintiff.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

A.—STATEMENT OF THE CASE.

Petitioner seeks a review of the Judgment of the Circuit Court of Appeals for the Seventh Circuit (reported in 117 Fed. (2d) 672) affirming a judgment of the District Court upon a jury verdict finding that he, as Defendant below, had secured an instrument of release (Tr. 92) from respondent in March, 1935, by false and fraudulent misrepresentations as to her former husband's financial condition and ability to pay her a large sum of money due her for her own and her two minor children's support and main-

tenance; and inducing her to accept a nominal settlement thereof. The sum due was approximately $24,000 (Tr. 155, 435). The amount of damages awarded by the jury was $12,500, being segregated as $4,000 with respect to the wife's support, and $8,500 with respect to the support of the two minor children.

This action in tort was brought by Respondent in her own individual capacity and as guardian of her two minor children to recover damages caused by the fraud and deceit of the Defendant in inducing her to accept a settlement and secured her signature to a release dated March 17, 1935, by falsely and fraudulently representing to her that her ex-husband, Thomas McConnell, was without money or property to meet his large obligations for her own and her children's support. The obligations were the outgrowth of a property settlement agreement dated March 20, 1928, between Plaintiff and McConnell, her then husband, whereby McConnell agreed as part of a divorce proceeding to pay Plaintiff $150 for her support until she remarried, and $100 per month for the support of her two minor children until their majorities (Tr. 83). Large sums had accrued thereunder, and Plaintiff and her children went years without any support from Mr. McConnell, who inherited substantial wealth on March 6, 1935. Defendant, knowing of this substantial wealth, falsely and fraudulently represented to Plaintiff that McConnell was without funds or property with which to pay his obligations, and had borrowed a small sum of money $1,250, to pay to her for accepting that settlement and signing a release of a large sum of approximately $24,000. Plaintiff was injured and damages by the acceptance of this nominal settlement, and when she filed a claim against the Estate of McConnell (who died in 1936), for the money due for her own and her children's support, and such claim was disallowed through the defensive use of the fraudulently obtained release by the Defendant as attor-

ney for the McConnell Estate. Plaintiff has received nothing in the courts on these claims to date (Tr. 99, 100).

Plaintiff thereafter brought suit against the McConnell Estate to enjoin the use of the fraudulently obtained release in the Probate Appeal for a hearing *de novo,* which suit was brought in the Superior Court of Cook County, Illinois. In that case it was found that there was no fraud in the procurement of the release, and Plaintiff's claim for money due for the children's support was therein partially allowed after being halved in a King Solomon fashion, which the Court of Appeals referred to as "fireside Justice" (Tr. 437), because Plaintiff had an undisputed claim for approximately $24,000 then due. An appeal is still pending in that case, and to date Plaintiff has not received anything whatever in satisfaction of her claim or of that judgment (Tr. 99-100).

B.—QUESTIONS PRESENTED AND SUMMARY OF ARGUMENT.

Defendant in his argument in support of his Petition herein presents four alleged grounds for this Court granting its discretionary Writ of Certiorari.

The real scope of his contentions are as follows:

I.

Defendant contends that, regardless of the proof of definite and real injury and damage in the acceptance of the nominal settlement and the denial of the claim in the Probate Court through his fraudulent conduct in obtaining the instrument of release, yet he is not liable for the damages incurred because the release is wholly illegal and no damages should have resulted from his fraudulent conduct.

II.

Defendant contends that the adjudications in the case brought by Plaintiff against the McConnell Estate to enjoin the use of the release in the Probate Court proceedings are properly pleadable in bar by him as *Res Adjudicata* on the questions of his fraud and deceit in this case, even though it is admitted that he was not a party to the other case or in privity with the Estate of McConnell, Defendant therein.

III.

Defendant contends that the Court of Appeals disregarded Illinois decisions affecting his alleged right to plead and introduce in *haec verba* the defensive pleadings in the Probate Court proceedings. This evidence was

prepared by him in another case and clearly a self-serving hearsay statement inadmissible in his own behalf. Its exclusion was proper under Illinois decisions, and of no prejudice to Defendant.

IV.

Defendant contends that the Court of Appeals disregarded applicable local decisions with respect to the District Court's instructions to the jury on the burden of proof in the case; but no such decisions are cited, and Illinois law supports the instructions given.

ARGUMENT.

I.

The Decision of the Court of Appeals Is Not in Conflict With the Decision of Another Court of Appeals or With Decisions of Courts of the State of Illinois With Respect to the Overruling of Defendant's Plea of Res Adjudicata.

The basis of Point I of Defendant's argument in support of his Petition herein is that the decision below was in conflict with the Eighth Circuit in the case of *Portland Gold Mining Co.* v. *Strattons, Ltd.*, 158 Fed. 63, and in conflict with the law of Illinois as expressed in the cases of *Anderson* v. *West Chicago R. R. Co.*, 200 Ill. 329, and *Lake Shore R. R.* v. *Goldberg*, 2 Ill. App. 228.

Respondent's contention is that the above cases cited by Petitioner are in complete harmony with the rule of *Res Adjudicata* announced by the Seventh Circuit in the case at bar which followed well established principles that such a plea is not available to a defendant unless he was a party to such other action in which the adjudication occurred, or was in privity with such person who was a party thereto.

Petitioner (hereinafter referred to as Defendant) complains that the Court of Appeals disregarded established principles of law sustaining the District Court's order striking from his defensive answer (Tr. 49-56) allegations to the effect that in a previous action brought by Respondents (Plaintiffs below) against the Administratrix of Thomas McConnell, deceased, in the Superior Court of Cook County, Illinois, to set aside and enjoin the use of the fraudulently obtained release. It was adjudicated therein that no false or fraudulent representations were

made to Respondent "to secure her *release* of the sum of $9,000 due and owing to her as alimony." (Tr. 55). Defendant, of course, has no hesitancy in first pleading these matters and then contending that plaintiff released nothing.

Contrary to Petitioner's contentions, the decision of the Court of Appeals below is not in conflict with the Eighth Circuit in the *Portland Gold Mining Case,* 158 Fed. 63, nor is it in conflict with the doctrine announced in *Anderson* v. *West Chicago R. R. Co.,* 200 Ill. 329.

The general rule of *Res Adjudicata* is that a judgment or decree of a court of competent jurisdiction, and the matters therein decided, is conclusive between the parties and their privies in any other action. The necessity for the identity of parties or privies is indispensable to the right to maintain the plea, and as to others such defense is unavailable.

See:

Litchfield v. *Crowe,* 123 U. S. 549.
Bigelow v. *Old Dominion Copper Co.,* 225 U. S. 111.

Our motion to strike this Plea of *Res Adjudicata* in the District Court was based upon the fact that the Defendant herein was not a party to such Superior Court suit nor was he in privity with the parties thereto, *i. e.,* the McConnell administratrix and heirs, and that such adjudication was therefore no bar to the action for damages against the fraud feasor in person. (Tr. 62).

Defendant, in his argument in support of his Petition herein, has repeatedly and recklessly stated that it was adjudicated in the Superior Court case that "he was not guilty of the fraud in question," inferring that his liability thereon was passed upon. There was no such adjudication pleaded, nor could there have been since he was admittedly not a party. His liability was not involved in

any way in that case as would enable him to plead the judgment as a bar to this action.

It is true that the evidence in the Superior Court case was substantially the same as here, with respect to the fraudulent nature of Defendant's representations in securing the release; but the mere fact that the evidence and the issues were the same is not controlling if Defendant was not a party thereto or in privity with the defendants herein.

Defendant cites as his chief case on Point I of his argument in support of his Petition, a decision of a trial court of New Castle County, Delaware, in the case of *Coca Cola* v. *Pepsi Cola*, 172 Atl. 260; which is the only case in point cited by Defendant, and which apparently stands for the proposition contended for herein by him; that Plaintiff has had one day in court against the McConnell Estate and now should not be allowed to pursue him for his own fraud. That decision, however, has no bearing upon the law of Illinois, and so far as can be determined was never even appealed to the Delaware high Court of Errors and Appeals. The doctrine announced therein is not good law, for it is well settled that merely because one has fully litigated his cause of action in a prior suit and has been defeated is of no avail in another suit in which a stranger to the first suit is a party involving precisely the same issues.

Old Dominion Copper Co. v. *Bigelow*, 203 Mass. 159, 206.

Keokuk R. R. Co. v. *Missouri*, 152 U. S. 301.

Crescent City Co. v. *Butcher's Union*, 120 U. S. 141, 155.

In *Fitch* v. *Stanton*, 190 Fed. 310 (C. C. A. 8), the general principles applicable to the rule of *Res Adjudicata* are stated as follows (page 314):

> "The essence of estoppel by judgment is that some right, question or fact in dispute between *parties* has been judiciously determined by a court of competent jurisdiction; and where such judgment is pleaded in

> bar of a subsequent action, the question is—*has such question been so determined between the same parties or their privies?*—and not upon what evidence was it determined, or the reason therefor." (Emphasis added.)

Because Defendant herein is interested in disproving the facts which were proven and determined in the Superior Court suit against other defendants is immaterial, unless he was a party or was in privity with parties to that suit; and the common interest in issues therein creates no privity with the Defendants in that case.

In the case of

> *Inhabitants of Sturbridge* v. *Franklin*, 160 Mass. 149,

the Supreme Court of Massachusetts said:

> "It creates no privity between two parties that as litigants in two different suits they happen to be interested in proving or disproving the same facts."

Defendant's contention under Point I of his argument in support of his Petition is based largely upon the assumption that a sort of privity exists between himself and the McConnell Estate. The cases he cites do not bear out his contention.

We have no dispute with the decisions cited by Defendant which hold that where an agent is first sued in tort and found not guilty, a plaintiff may not thereafter proceed against the principal, who liability, if any, is purely derivative; *i. e.* derived from his relationship to his agent on the doctrine of *Respondeat Superior* and not because of his own wrong. The law is clear that if the "wrongdoer agent" is first found to be not guilty in an action against him, the principal, because of his derivative liability, is in that sense in privity with the agent and may plead the Judgment as a bar. It does not follow, however, that a Judgment in a suit first brought against a principal to rescind a release for fraud should be *Res Adjudicata* as

to the agent who was not a party to the suit, for the agent's liability is the liability of an active *tort feasor,* and is not in any sense derived from his relationship to his principal.

That there is no general privity in this sense between an agent and his principal is well established. The general rule is stated thus in 34 Corpus Juris 1024:

> "Ordinarily, a judgment against the principal is not binding or conclusive on an agent who was not a party to the action."

Obviously, if it was not binding against him it cannot be used in his favor to escape trial for his own active fraud and deceit.

See:

Bigelow v. *Old Dominion Copper Co.*, 225 U. S. 111.
Portland Gold Mine Co. v. *Stratton,* (C. C. A. 8) 158 Fed. 63.

Again the rule is stated in 24 Am. & Eng. Enc. Law, 2d Ed., page 747:

> "The fact that two parties as litigants in two different suits, happen to be interested in proving or disproving the same facts, creates no privity between them. * * * A judgment on the merits in favor of the agent is a bar to an action against the principal for the same cause, because the principal's liability is predicated upon that of the agent. But a judgment against the agent is not conclusive in an action against the principal."

In Freeman on Judgments (5th Ed.) par. 469, Vol. I page 1029, it is said:

> "Agents and principals, including, of course, masters and servants, do not, as such, have any mutual or successive relationship to rights of property. They are not in privity with each other. Consequently, the principal or master is not bound by the judgment obtained in an action by or against the agent or servant and vice versa. * * *
>
> "But when it is held, as it has been, that a judgment

in favor of the principal in action against him for the fraud of his agent is *res adjudicata* in favor of the latter when sued for the same fraud, the only possible basis for such a ruling is the broad ground that the principal and agent represent each other in all litigation based on the agent's acts whether tortuous or otherwise. Such a position is obvious untenable and contrary not only to the principles already stated in this section but opposed to the rule that a judgment in favor of one joint *tort feasor* is not a bar to an action against another, at least when he has no right to indemnity and also violates the principle of mutuality, since a judgment against the principal would not in such case bind the agent or servant."

The author cites the case of *Krolich* v. *Curry*, 148 Mich. 214, as opposed to this view, which case he criticizes severely and says that it was based upon the case of *Emery* v. *Fowler*, 39 Me. 326, also cited by defendant herein, as persuasive authority for reviewing the Court of Appeals of the Seventh Circuit.

The Illinois cases cited by Defendant in support of his plea of *Res Adjudicata* are no authority for the proposition that adjudications in favor of a principal, who was not an active wrongdoer, and whose liability, if any, is purely derivative, may be a bar to a suit against an active wrongdoing agent, and are not in conflict with the decision of the Court of Appeals below.

The case of *Lake Shore Railway* v. *Goldberg*, 2 Ill. App. 228, cited by Defendant, was an Action of Trespass against a railroad company which pleaded that the Plaintiff had previously sued both it and its agent C, for the identical trespass which had been performed by C alone as the agent of the railroad company; that in said case C was found not guilty, and the railroad company was dismissed. In sustaining the plea as a bar to further action against the railroad company the Appellate Court said at page 228:

"* * * We take the substance of this averment to be that the liability of Appellant was claimed to have

> arisen, and if there was any, must have arisen solely from its relation as principal to the said Cornwall, whose acts * * * constituted the trespass complained of."

And again at page 234:

> "But where the real actor, none the less liable personally because acting for another, is not guilty, it necessarily follows that the party for whom he acted cannot be."

This case is no authority for the converse of the proposition contended for by Defendant, that he, the real actor, should be held not guilty because of prior adjudications in a different suit against his non-acting principal. In the Lake Shore Railway case, the principal could be liable only in a derivative sense if the agent was, in that its liability was based solely upon *"Respondeat Superior"*, and since the agent was found not guilty in a case against him, the principal cannot be liable because his liability, if any, is derived from the agent. While in the case at bar Defendant is sought to be charged as an active fraud feasor, for his own wilful fraudulent acts, and not because of his agency relationship with another. It is clear that Defendant's liability is not derivative from either McConnell or the McConnell Estate, and he can claim no privity thereto.

The other Illinois case cited by Defendant, under Point I of his argument in support of his Petition, *Anderson* v. *West Chicago Railway*, 200 Ill. 329, is in complete harmony with the well settled principles of law adopted by the Court of Appeals below, for in that case the active wrongdoer was first found not guilty in a suit against him and therefore the lessor, whose liability, if any, was purely vicarious, was properly freed on a plea of *Res Adjudicata*. It must be noted that there was an element of undisputed privity between lessor and lessee, and the Illinois Court's use of the term "principal and agent" is in reference to

that relationship. It also appears that the lessee, who was later sued, had previously undertaken to conduct the defense of the lessor.

The decision of the Court of Appeals of the Eighth Circuit which Defendant contends is in conflict with the decision below is in fact in complete accord with such decision and our own arguments herein. That case, *Portland Mining Co.* v. *Stratton,* 158 Fed. 639 (C. C. A. 8), was a suit for damages in trespass. The defendant, a principal in the transaction, and another through whom the defendant had acted were first sued. The immediate actor was exonerated on a direct verdict, and it was held that since the one who committed the trespass, if any, was exonerated, the defendant-principal should also be, and the court pointed out that there was privity between the actor and the defendant in the trespass, in other words, the defendant was liable only if the actor was. Justice Van Deventer, who wrote the court's opinion said, page 65:

> "The objection urged against it (estoppel) now and heretofore are (1) that, as the responsibility of joint *tort feasors* is several as well as joint, one may be exonerated and another held culpable; and (2) that one may not have the benefit of an adjudication as an estoppel, unless he would have been prejudiced by it had it been the other way. But it is quite generally held that these objections do not prevent an estoppel *where, as here, the one exonerated was the immediate actor and his personal culpability is necessarily the predicate of the plaintiff's right of action against the other, and we think upon principle this ought to be so.*"

We see no comfort to Defendant in the above undisputed principle of law, and we see no conflict with the decision of the Seventh Circuit below. Defendant's counsel has artfully contrived to interpret the language of that decision as fitting his case. An examination of that opinion will dispel the befuddled arguments of Defendant's Petition.

It requires no citation of authority to illustrate the privity

which exists between grantor-grantee, mortgagor-mortgagee, assignor-assignee, lessor-lessee, etc. An agent does not bear such relationship of privity under all circumstances from his principal. The agent is not liable in tort because he was an agent of another in privity thereto, but rather because he himself was a wrongdoer. He is liable for his own torts and his liability is neither decreased nor increased by his own agency or his principal's conduct. There is no vicarious liability on the part of the agent from his principal, there is such liability on the part of the principal from his agent, and in this sense only there is privity between them.

The distinction is recognized in many decisions, and is clearly illustrated by the statement of the Illinois Supreme Court in the case of:

Feitel v. *Chicago City Railways Co.*, 211 Ill. 279,

wherein the court held that a motorman-agent had no interest to disqualify him as a witness in a suit against his employer, for the reason that a judgment for or against the principal is not conclusive on the agent. In discussing this question the court said, page 287:

> "If the direct legal effect of a judgment will be to establish a claim against the witness, he has a direct interest in the event of the suit within the meaning of the statute. But that can only be where the judgment will be evidence against the witness of his liability. As already shown a judgment against the defendant in this case would be no evidence, in a suit against the motorman, that he had been negligent or that such negligence was the cause of the accident."

and again, page 288:

> "If the witness should be subsequently sued by the plaintiff for the same wrong, the judgment would be neither evidence for nor against him. He would not be relieved of liability by the judgment."

We feel that the *Feitel* case rather than *Anderson* v. *West Chicago Railway*, 200 Ill. 329 cited by Defendant is

in point on the question involved, and is in complete harmory with the decision below.

In the case of *Cragin* v. *International S. S. Co.*, (C. C. A. 2) 15 Fed. (2d) 263, "P" sued to recover broker's commission against a steamship company on charter. "P" offered to show that on previous occasion an agent of the defendant sued on charter *vs.* the plaintiff, and recovered. "P" then argued that defendant was estopped of record to deny that "P" was chartered. The Court in holding there was no "estoppel by judgment" said, page 264:

> "Now assuming that the suit was lawfully brought, the judgment *per se* binds only parties and privies. This defendant was no party, and there being no mutual or successive relationship to property rights between agents and their principals, defendant was not in privity with Suzuki."

An agent active wrongdoer may not plead as a bar as *Res Adjudicata* a Judgment or matters adjudicated in an action first brought against his principal, is well settled throughout the land.

See:

Bigelow v. *Old Dominion Copper Co.*, 225 U. S. 111.
Bigelow v. *Old Dominion Copper Co.*, 203 Mass. 159, 206, (89 N. E. 193).
Cragin v. *International S. S. Co.*, (C. C. A. 2) 15 Fed. (2d) 263.
Thornton v. *Columbus Gas Co.*, 18 Ohio St. Pns. 158, 160.
Carey v. *Conn*, 107 Ohio St. 113 (140 N. E. 643).
Myers' Adm. v. *Brown*, 250 Ky. 64 (61 S. W. 2d 1052, 1054).
McFaddin Co. v. *Texas Rice Land Co.*, 253 S. W. 916, 928.
Sutter v. *Kansas City*, 138 Mo. App. 105, 119 S. W. 1084 (Kan.).
American Express Co. v. *Des Moines Bank*, 146 Iowa 448 (123 N. W. 342).

The principle is most lucidly stated by the Court of Civil Appeals of Texas in the case of:

McFaddin v. *Texas Rice Land Co.*, 253 S. W. 917, at 928,

as follows:

> "We do not come to the position of Weiss and Kyle with reference to their pleas of estoppel on account of the former judgment, in favor of McFaddin. The general rule is that where the cause of action is forwarded upon a tort, a judgment without satisfaction against one of two trespassers is not a bar to another action against the other for the same trespass, and that a judgment adverse to the plaintiff in a suit against one of two joint *tort feasors* is not a bar to a suit against the other. *But there is a well defined and established exception to this rule where the immediate actor, or active wrong-doer, has been sued and a judgment has been rendered in his favor.* In such case the plaintiff cannot recover against the other who has not participated in the trespass. This doctrine has particular application to such relations as principal and agent, master and servant, and whenever one of the parties is bound, not by any fault of his own, but derivatively through the act of another." (Emphasis added.)

The court in that case then reviews practically every authority cited by the defendant herein.

In approaching the question involved, this court's attention is respectfully directed to the fact that the complaint herein charges the Defendant with being the actual fraud-feasor. He is charged with liability for his own active and wilful fraud and deceit in depriving a helpless mother and two minor children of their rights to parental support. His liability, if any, is based upon his own acts, and not derived from any relationship which he bears to another. He has no vicarious liability such as a principal might have for the conduct of his agent within the scope of his authority, and, accordingly, he as the active wrongdoer has no privity

with the McConnell Estate upon which to base his plea of *Res Adjudicata.*

For an additional reason, this defendant cannot claim privity with the defendants in the Superior Court action, and that is because there is no privity between him and the McConnell Estate, as such.

The decision of the Massachusetts court in the *Bigelow* case, above cited, reported in 203 Mass. 159 (40 L. R. A. N. S. 347), the Court said, page 219:

> "For another reason the New York Judgment in favor of Lewishan seems not to be a bar. The joint actor with the defendant was not the defendant in the New York suit, but it was prosecuted against his executors. If it be assumed that there is a kind of privity between the two who acted in concert, that privity was broken by the death of one. There is no privity between Lewishan's executors and Bigelow."

From the authorities above and from the nature of the allegations of the complaint that this defendant was the active fraud feasor, we respectfully submit that there was no such privity of estate or liability with the McConnell Estate in the Superior Court action as to make that judgment on the matters therein determined to be *Res Adjudicata* of this action. This defendant being charged as an active tort feasor has no privity with his client-principal except as a joint tort feasor, under the decision in *Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111, and the plea of *Res Adjudicata* contained in defendant's answer was properly stricken.

II.

The Decision of the Court of Appeals With Respect to the Question of the Validity or Invalidity of the Release Is in Conformity With Applicable Local Illinois Decisions and Was Not in Conflict With Any Decision of Any Other Circuit Court of Appeals.

Under Point II of his argument in support of his Petition, Defendant argues that the decision below is in conflict with a decision of another Circuit Court of Appeals with respect to its ruling that the question of the validity or invalidity of the fraudulently obtained release could not be raised by the Defendant. He, however, neglects to cite any Court of Appeals decision supporting his contentions in this regard. The weakness of Defendant's argument is illustrated in an examination of his oft repeated assertion in his argument that "it was imperative that Plaintiff establish that the release was valid."

Such an argument is in direct conflict with well established principles of local Illinois law in decisions of the Illinois courts in cases of fraud and deceit.

We cannot fail to point out to the Court the hypocrisy of Defendant's position in urging in this case that the fraudulently obtained release was invalid and therefore should be determined to have caused no damage or injury to Plaintiff, when the undisputed record in this case is that this same Defendant as counsel for the McConnell Estate caused Plaintiff to accept a nominal settlement and thereafter used the fraudulently obtained release to bar Plaintiff's claim in the Probate Court of Cook County for alimony, and support money for her children (Tr. 156-7), and that to date, not one cent has been recovered by Plaintiff on her claim for approximately $24,000.00 (Tr. 100).

Defendant's argument that the legal question as to the validity or invalidity of the instrument of release is an

essential part of Plaintiff's case is not accepted law, for it is well settled that such an issue is not an essential one herein where other direct and conclusive evidence of injury is established: *i. e.* Plaintiff's acceptance of a nominal settlement, the denial of the Plaintiff's claim in the Probate Court by defensive use of the release, and Plaintiff's inability to collect anything to date on her claim.

An analysis of Defendant's motion to dismiss which attacks the validity of the instrument of release reflects repeated assertions that "the instrument of release cannot be made the basis of any claim for damages" (Tr. 23, 24).

It seems too plain for argument that the fraudulently obtained instrument of release is not the basis of this action as contended by Defendant. The real gist of the action is the fraud and deceit, and the injury caused thereby. As succinctly stated by the court in the case of:

Chanin v. *Chevrolet,* (C. C. A. 7) 89 Fed. (2d) 889, at 891:

> "An action of deceit to recover damages for fraud inducing the making of the contract *is not based upon the contract but upon the tort.* 27 C. J. 16."

Thus, Plaintiff need only allege and prove the essential elements of fraud and deceit, including injury or damage, to sustain her case. The release, or its legal effect, is not the basis of the case, as urged by Defendant; and the Defendant may not escape liability by urging as a matter of abstract law that no injury should have resulted, in that the release obtained by his fraudulent conduct should never have been a bar to Plaintiff's claim against the McConnell Estate because such release was invalid.

Naturally, we should have been pleased to accept Defendant's present legal arguments in the Probate Court of Cook County at hearing on the claims, but there Defendant in person, as attorney for the McConnell Estate successfully asserted the validity of the release as a bar to such claims (Tr. 156, 157). The injury and damage al-

leged and proved is not one of legal theory, (bordering on sophistry) but one of cold hard fact.

When an adjudication is properly admissible as was the proof of injury by the denial of the Probate claim, it is conclusive and final under Illinois law even if an appeal is pending.

See:

Moore v. *Williams,* 132 Ill. 589.

The Court of Appeals correctly construed the law applicable, and refused to consider the plea of the fraud feasor which would allow him to derive a direct benefit from his own acts of fraud and deceit (Tr. 439-40).

See:

Mutual Life Ins. Co. v. *Armstrong,* 117 U. S. 591.

If Defendant felt that the instructions given by the District Court, and assented to by him, did not completely cover every element of damage in the case, then appropriate exception should have been taken, and further instructions tendered for the court's consideration. Under the state of the record, he cannot now be heard to complain.

Penn. R. R. v. *Minds,* 250 U. S. 368, 375.
Mobile R. R. v. *Jurey,* 111 U. S. 584, 596.

As a matter of law the issue of the validity or invalidity of the instrument of release is not a question which the Illinois courts allow a fraud feasor defendant to raise.

In the case of *Tate* v. *Watts,* 42 Ill. App. 103, where an action for fraud and deceit was brought by the purchasers of land against the seller, the defendant contended there was no injury or damage and entered several pleas to the effect: (1) that the contract for the sale of the land was not in writing and signed by the seller in violation of the statute of frauds and perjuries, and (2) that the deed conveying the land to the plaintiffs was void for defects in conveyancing and therefore conveyed no title.

As to the first plea of illegality of the instrument, the court said: (page 105)

> "The cause of action set out in the declaration does not admit of such a defense. It is not based upon a contract conveying real estate not to be performed within a year, nor is appellant charged upon any contract of that kind. *The gist of the action is fraud and deceit.* It has nothing whatever to do with the Statute of Frauds. The statute was intended to guard against the danger of fraud and perjury being committed in the establishment of contracts concerning land running longer than one year, *but not to protect persons against tortious acts, and misrepresentations where others are* injured thereby" (emphasis added).

On the second point that the deed was void and there was therefore no injury, the court said at page 107:

> "There is a point made by appellant that the deed from Peterson for the land in Henderson County, Illinois, was made out in blank, the names of the grantees not being filled in at the time * * * and that the deed for that reason was void and conveyed no title.
>
> "Hence it is inferred that the appellees have no right of recovery in this action. It is difficult for us to see how this could injuriously affect appellees' right of recovery."

As pointed out by the Illinois Court, the gist of the action is fraud and deceit, and it does not avail the tort feasor to urge that the deed given (or received) was invalid for any reason.

If pecuniary loss occurs, it is the basis of a recovery, and the theoretical invalidity of the release executed at the time of the fraud is no defense to the action for damages due to the fraud. The law which Defendant urges on the invalidity of the releases was intended to protect helpless women and children collect their proper support from a divorced parent, not to aid a fraudulent minded lawyer to seal their loss by his fraud.

See also:

Solonemsky v. *Zevin*, 267 N. Y. Supp. 589 (App. Div.).

Rosenfield v. *Rosenfield*, 2 N. Y. Supp. (2d) 107.

Lindley v. *Kemp*, 76 N. E. 798, 803 (Ind. App.).

Under the circumstances, the court correctly instructed the jury with respect to the measure of damages. The release itself recites that provisions "for the support of the party of the first part or the children of the parties hereto, is hereby cancelled" (Tr. 93). Thus the release purported to expressly cancel the full obligation. And Defendant so pleaded it in the Probate Court (Tr. 43).

Defendant makes some reference under Point II and more extensively under Point III of his argument in support of his Petition, to the state of the trial record with respect to his attempt to plead in his answer portions of the defensive pleadings in the Probate proceedings on the Plaintiff's claim, inferentially stating that he was seriously prejudiced by the striking of such matter from his answer and its exclusion from evidence, contending that such hearsay evidence would tend to prove that the Probate Court did not act on the release.

The ruling of the District Court was squarely in line with the well established law of Illinois, in excluding such immaterial and collateral evidence, which was also self-serving hearsay:

See:

Ivanhoe v. *Buda Co.*, 247 Ill. App. 336, 341;

Under well settled decisions a trial court has a wide range of discretion in the admission or exclusion of evidence on a collateral question, particularly where, as here, it could not set up any defense to the issues.

See:

United States v. *Socony Oil*, 310 U. S. 150, 310.

Reeve v. *Dennett*, 145 Mass. 23, 28.

Defendant also contends that the record discloses the claim in the Probate Court was denied for failure of proof of the sum due, and not because of the release. Such an argument is utter nonsense in view of the record and the law involved. The offer of Defendant's Exhibit G (Par. 7, Tr. 33), a portion of the defensive pleadings in the Probate Court, was properly rejected by the court in view of the law as announcned in the case of *Ivanhoe* v. *Buda Co.*, 247 Ill. App. 336, 341. Defendant's Exhibit G is not in terms a denial of the accrual of any sum under the McConnell property settlement agreement dated March 20, 1928, which contract (Plaintiff's Exhibit 1, Tr. 79-85) clearly created an obligation on McConnell from March, 1928, to his death in June, 1936, of approximately $24,000.00 for the support of his ex-wife and two minor children during that period.

It is a well settled Probate law of Illinois that when a debt arises from a contract or judgment, which is conclusive, and a claim is filed against the estate of a decedent thereon, any payment of the claim contended for is a pure defense and must be established by the executor.

See:

Andrews v. *Votaw*, 240 Ill. App. 311, 322.

Defendant's crafty attempt to shirk the burden of proof by the language employed in Defendant's Exhibit G, cannot be now made the basis of an argument that he could have shown thereby that the Probate Court denied the claim for failure of proof of the amount due rather than by his use of the fraudulently obtained release to bar the Plaintiff's otherwise conclusive claims. The obligation as the basis of the claim was conceded by the Probate objection (Tr. 42-3) therefore any payment or credit thereon would be defense thereto to be established by the Executor. As a matter of fact, the record is clear that the Probate Court acted solely on the release on Defendant's claim

that it was a bar to the claim (Tr. 157). Defendant's answer shows that it was so pleaded by him in the Probate Court (Tr. 43, 48). How then should he be heard to argue that such injury and damage as have occurred should not have occurred because the release was invalid? Such hypocrisy should not go unlabeled, and his contentions in this respect are without merit.

III.

The Decision of the Court of Appeals With Respect to the Exclusion of the Probate Objection Was Not in Conflict With Applicable Local Decisions.

Under Point III of his argument in support of his Petition Defendant has inserted the heading that the Court of Appeals decision below decided "an important question of local law *probably* in conflict with applicable local decisions." Defendant does not point out the important question presented. In fact, it is a most collateral question of evidence and pleading strictly in conformity with courts of Illinois and other jurisdictions.

The striking of the Probate objections (Tr. 63) and the exclusion of a limited portion thereof as evidence at the trial (Tr. 353) was in complete conformity with an applicable local decision in the case of *Ivanhoe* v. *Buda Co.*, 247 Ill. App. 336, 341, as pointed out under Point II herein, *ante*. Both the District Court, and the Court of Appeals correctly followed the rules of evidence announced therein. It would serve no useful purpose to answer at length the Defendant's ponderous arguments in this regard. Much of what we have said under Point II, *ante*, is applicable hereto and is hereby adopted.

Nothing that Defendant pleaded or offered in evidence would have tended to shed any light on the reason why he now contends the Probate claim was disallowed. The rec-

ord is conclusive that it was because of the release (Tr. 48, 157); and Defendant, himself on the witness stand, gave no testimony whatever as to what transpired at the hearing in the Probate Court on Plaintiff's claim.

IV.

The Opinion of the Court of Appeals Was Not in Conflict With Any Applicable Local Decision With Respect to the Instruction on the Burden of Proof.

Again, Defendant asserts that the Court of Appeals opinion was "probably" in conflict with an applicable local decision with respect to the charge to the jury that Plaintiff must prove the issues by a preponderance of the evidence to the satisfaction of the jury instead of the requested "clear preponderance" or "clearly to the satisfaction of the jury".

The Court of Appeals reviewed all the Defendant's instructions tendered and refused and stated, 117 Fed. (2d) at page 680:

> "The court fairly and fully instructed the jury upon this subject matter and the nice gradations attempted to be framed by the defense in the instructions tendered would have only confused the jury. The instructions given properly interpreted the law of fraud and deceit, and the burden of proof in actions therefor."

The District Court did properly and fairly instruct the jury as to the burden of proof: (Instruction 12, Tr. 371, 372), and correctly charged the jury as to the burden of proof with respect to the issues on the elements of fraud, (Instruction 21, Tr. 374, 375) to the giving of which Defendant took no objection.

The law does not require Plaintiff to prove her case by a "clear" preponderance of the evidence. All that is

required is that she prove the elements of fraud by a preponderance or greater weight of the evidence.

See:

Merchants Bank v. *Lyon,* 185 Ill. 343, 354.
Mortimer v. *McMullen,* 202 Ill. 415.
Endsley v. *Johns,* 120 Ill. 469, 721.
Miller v. *Steel,* 153 Fed. 714, 721 (CCA).
Crane v. *Shaefer,* 140 Ill. App. 647.

The quoted extract from the Illinois case cited by Defendant may not be urged as requiring such instruction as was tendered by defendant be given to a jury on the burden of proof rule. That case has no application to the point on which Defendant urges it as authoritative.

It is respectfully submitted that the District Court's instructions were entirely without error in respect of the matters complained of by Defendant.

Conclusion.

Space does not permit a full discussion of the fraudulent nature of Defendant's transaction in securing the release from Plaintiff. None but trivial and technical defenses were raised in the courts below. And the so-called "important" questions are raised on such defenses to secure escape for a cheat and a fraud. The Court of Appeals opinion reflects a thorough and learned discussion of the issues involved, none of which suffice this court granting its Writ of Certiorari.

We therefore respectfully ask that Petitioner's application for a Writ of Certiorari be denied.

Respectfully submitted,

THOMAS DODD HEALY,
BERNHARDT FRANK,
Attorneys for Respondent.
208 So. La Salle St.,
Chicago, Illinois.